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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. WILLIAMS and MAMIE WILLIAMS,	)	
Appellants,	)	
vs.	)	No. 03A05-0708-CV-471
GREGORY HILYCORD,	)	
Appellee.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick D. McGillivray, Judge
Cause No. 03D02-0611-CC-166

May 8, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

A default judgment was entered in Bartholomew Superior Court against Michael and Mamie Williams ("the Williamses") voiding a land sales contract they had entered into with Gregory Hilycord ("Hilycord") for the purchase of a large tract of land in Bartholomew County. The Williamses filed a motion to set aside default judgment, which was denied. They appeal and argue that the trial court erred when it granted default judgment in favor of Hilycord because the remedy of forfeiture was not warranted by the allegations in the complaint. We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

On March 18, 2005, Hilycord and the Williamses entered into a land sales contract for the purchase of a large tract of land in Bartholomew County. Pursuant to the terms of the contract, the Williamses agreed to purchase the acreage for $375,000. At the time of purchase, the Williamses had paid $1000 and they gave Hilycord $50,000 on the date they entered into contract. The Williamses agreed to pay $1,000 per month thereafter, $42,500 six months after the contract was executed and $30,000 semiannually thereafter until the contract was paid in full.

Prior to October 18, 2006, the Williamses had made payments totaling $106, 881.92. On October 18, 2006, the Williamses failed to pay their monthly payment of $1000 and their $30,000 semi-annual payment, both of which were due and owing. On November 27, 2006, Hilycord filed a complaint against the Williamses alleging that they "have not paid the installment that was due on October 18, 2006, in the amount of $31,000. That failure to make monthly payments has been for longer than a thirty day

period of time, which is the default period [under the contract]." Appellant's App. p. 8. Hilycord requested that the trial court cancel and terminate the contract between Hilycord and the Williamses. Id. a 9.

With regard to default, the parties' contract provides in pertinent part:

> 10. . . . Upon the occurrence of any Event of Default, as hereinafter defined, and at any time thereafter, the entire Contract Balance, and all accrued, unpaid interest thereon, shall, at the option of the Seller, become immediately due and payable without any notice, presentment, demand, protest, notice of protest, or other notice or dishonor or demand of any kind, all of which are hereby expressly waived by Purchaser, and Seller shall have the right to pursue immediately any and all remedies, legal or equitable, as are available under applicable law to collect such Contract Balance and accrued interest, to foreclose this Real Estate Contract, and as may be necessary or appropriate to protect Seller's interest under this Contract and in and to the Real Estate. The following shall each constitute an "Event of Default" for the purposes of this Contract:
>
> a. Default by Purchaser for a period of thirty (30) days in the payment of (i) any installment of the Purchase Price when due under the terms of this Contract, (ii) any installment of real estate taxes on the Real Estate or assessment for a public improvement which by the terms of this Contract are payable by Purchaser, or (iii) any premium for insurance required by the terms of this Contract to be maintained by Purchaser;
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> ***
>
> In the event Purchaser deserts or abandons the Real Estate or commits any other willful breach of this Contract which materially diminishes the security intended to be given to Seller under and by virtue of this Contract, then it is expressly agreed by Purchaser that, unless Purchaser shall have paid more than eighty percent (80%) of the Purchase Price, Seller may, at Seller's option, cancel this Contract and take possession of the Real Estate and remove Purchaser therefrom[.] . . . In the event of Seller's cancellation upon such default by Purchaser, all rights and demands of Purchaser under this Contract and in and to the Real Estate shall cease and terminate and Purchaser shall have no further right, title or interest, legal or equitable, in and to the Real Estate and Seller shall have the right to retain all amounts paid by Purchaser toward the Purchase Price as an agreed payment for Purchaser's possession of the Real Estate prior to such default.

Appellant's App. pp. 17-19.

The Williamses did not file a responsive pleading after they were served with Hilycord's complaint. However, Michael Williams contacted Hilycord and agreed to pay the delinquent payment plus an additional $750 to compensate Hilycord for his attorney fees. Williams tendered a $20,000 check to Hilycord at the end of December. Williams claims to have sent a second check in the amount of $11,750 on or about January 2, 2007, but Hilycord stated that he never received that check. Appellant's App. p. 26; Tr. p. 12. Hilycord returned the Williamses' $20,000 check shortly after he received it. Tr. p. 12.

On January 19, 2007, Hilycord filed a motion for default judgment. The trial court granted that motion five days later and issued the following order: "the Real Estate Contract between [Hilycord and the Williamses] dated March 18, 2005, is now canceled and considered null and void and [the Williamses] no longer have an interest in the real estate described on the attached Exhibit A." Appellant's App. p. 5.

On March 3, 2007, the Williamses filed a motion to set aside default judgment. They asserted that they did not receive a copy of the judgment and first learned of the default judgment on February 27, 2007. The Williamses also argued that the default judgment "operates as a forfeiture" and the complaint "lacks any allegation that [the Williamses] have abandoned the property or absconded[,]" or that Hilycord's "security interest in the subject property is at risk." Id. at 27. After a hearing, the trial court denied the Williamses' motion and concluded that although the Williamses had presented a meritorious defense, they failed to establish justifiable neglect in responding to the complaint. Id. at 7. The Williamses now appeal.

Discussion and Decision

The Williamses argue that the trial court abused its discretion when it denied their motion to set aside default judgment. We review the grant or denial of a Trial Rule 60(B) motion for relief from judgment under an abuse of discretion standard. Ross v. Bachkurinskiy, 770 N.E.2d 389, 392 (Ind. Ct. App. 2002). The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. Id. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Id.

Indiana Trial Rule 55(A) authorizes the entry of default judgment for failure to file a pleading. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). However, pursuant to Indiana Trial Rule 55(C), a default judgment may be set aside if grounds set forth in Indiana Trial Rule 60(B) exist. Trial Rule 60(B) provides in pertinent part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> ***
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> ***
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

Ind. Trial Rule 60(B) (2008).

In their motion to set aside default judgment, the Williamses alleged "excusable neglect, misrepresentations or misconduct of an adverse party, or [] any other reason justifying relief from the operation of judgment." In their brief, the Williamses do not argue that the default judgment should be set aside due to excusable neglect or misconduct of Hilycord. Therefore, we only address whether the default judgment should be vacated for "any reason justifying relief from the operation of the judgment[.]" T.R. 60(B)(8).

The Williamses argue that the trial court awarded Hilycord "relief to which he was not entitled by the contract or Indiana law" when it ordered forfeiture of the contract. Specifically, they assert that the facts alleged in Hilycord's complaint do support the remedy of forfeiture.[1]

Forfeitures are generally disfavored under Indiana law because significant injustice results when the buyer has a substantial interest in the property. McLemore v. McLemore, 827 N.E.2d 1135, 1140 (Ind. Ct. App. 2005) (citing Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973)). Land sales contracts are akin to mortgages, and therefore, the remedy of foreclosure is more consonant with the notions of fairness and justice. Id.

> [J]udicial foreclosure of a land sale contract is in consonance with the notions of equity developed in American jurisprudence. A forfeiture a strict foreclosure at common law--is often offensive to our concepts of justice and inimical to the principles of equity. This is not to suggest that a forfeiture is an inappropriate remedy for the breach of all land contracts. In the case of an abandoning, absconding vendee, forfeiture is a logical and

[1] A significant portion of Hilycord's brief is devoted to the argument that the Williamses have claimed that the contract is unenforceable. The Williamses' brief is devoid of any argument concerning the enforceability of the contract. See Reply Br. at 2 ("Defendants have never claimed the contract is unenforceable.")

> equitable remedy. Forfeiture would also be appropriate where the vendee has paid a minimal amount on the contract at the time of default and seeks to retain possession while the vendor is paying taxes, insurance, and other upkeep in order to preserve the premises. Of course, in this latter situation, the vendee will have acquired very little, if any, equity in the property. However, a court of equity must always approach forfeitures with great caution, being forever aware of the possibility of inequitable dispossession of property and exorbitant monetary loss. We are persuaded that forfeiture may only be appropriate under circumstances in which it is found to be consonant with notions of fairness and justice under the law.

Skendzel, 261 Ind. at 240-41, 301 N.E.2d at 650.

Forfeiture is an appropriate remedy only in the limited circumstances of 1) an abandoning or absconding vendee or 2) where the vendee has paid a minimal amount and the vendor's security interest in the property has been jeopardized by the acts or omissions of the vendee. McLemore, 827 N.E.2d at 1140. Here, the parties' contract contained the following provision concerning the remedy of forfeiture:

> In the event Purchaser deserts or abandons the Real Estate or commits any other willful breach of this Contract which materially diminishes the security intended to be given to Seller under and by virtue of this Contract, then it is expressly agreed by Purchaser that, unless Purchaser shall have paid more than eighty percent (80%) of the Purchase Price, Seller may, at Seller's option, cancel this Contract and take possession of the Real Estate and remove Purchaser therefrom[.] . . . In the event of Seller's cancellation upon such default by Purchaser, all rights and demands of Purchaser under this Contract and in and to the Real Estate shall cease and terminate and Purchaser shall have no further right, title or interest, legal or equitable, in and to the Real Estate and Seller shall have the right to retain all amounts paid by Purchaser toward the Purchase Price as an agreed payment for Purchaser's possession of the Real Estate prior to such default.

Appellant's App. p. 18.

In his complaint, Hilycord alleged the following: "That the [Williamses] have failed to perform all the conditions of the contract by failing to pay sums of money due and owing, specifically the [Williamses] have not paid the installment that was due on

October 18, 2006, in the amount of $31,000. That failure to make monthly payments has been for longer than a thirty day period of time, which is the default period." Appellant's App. p. 8. Further, Hilycord alleged that the Williams had paid $106,881.92 towards the purchase price of $375,000, or 28.5% of the purchase price. Id. Hilycord did not allege that the Williamses had abandoned the property, or that the Williamses' breach of contract had either diminished his security interest or placed his security interest in jeopardy.[2]

Accordingly, we conclude that Hilycord failed to allege any facts that would warrant the remedy of forfeiture. Moreover, we observe that payment of $106,881.92 or 28.5% of the contract price is not a minimal amount, particularly where the Williamses made payments continuously for eighteen months. See McLemore, 827 N.E.2d at 1142 ("In addition to the amount paid, this court has also considered the length of time and the number of payments made in determining whether a vendee had made minimal payment. The Skendzel court did not provide a minimal threshold that would permit forfeiture, but held that a vendee who had paid 29% of principal had made more than minimal payment.").

The Williamses did breach the contract by failing to make the $31,000 payment owed, but the appropriate remedy for this breach was foreclosure. Consequently, the trial court erred when it ordered forfeiture of the parties' contract because the facts pleaded in

[2] The default judgment was entered against the Williamses on January 23, 2007. Three mechanics liens were filed against the property in April of 2007. Hilycord argues in his brief that the Williamses have encumbered the property, and further, that the amount of the liens "effectively reduce[s] the amount paid by the Williamses to $26,255.07." Br. of Appellee at 20. Because the liens were filed nearly three months after default judgment was entered, Hilycord's argument with regard to encumbrance of the property is unavailing.

Hilycord's complaint did not warrant the remedy imposed. We conclude that the trial court's error in ordering forfeiture of the contract justifies relief from operation of judgment under Trial Rule 60(B)(8), and therefore, the trial court abused its discretion when it denied the Williamses' motion to set aside default judgment.

Reversed and remanded for proceedings consistent with this opinion.

ROBB, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

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Appellants,	)	
vs.	)	No. 03A05-0708-CV-471
GREGORY HILYCORD,	)	
Appellee.	)	

FRIEDLANDER, Judge, **dissenting**

I respectfully dissent from the Majority's determination that default judgment in favor of Hilycord must be set aside.

I note as a preliminary matter that the Williamses assert that the contract provision in question did not contemplate the buyer's failure to make payments as a condition that would give rise to a right to forfeiture on the seller's part. As the Williamses phrase it, "The real estate contract between the parties provides for two distinct remedies: forfeiture in the event of abandonment or conduct that puts the Seller's security at risk; and, foreclosure in the event of delinquent payments." *Appellant's Brief* at 5. To review, that provision states, "In the event Purchaser deserts or abandons the Real Estate *or commits any other willful breach of this Contract which materialyl diminishes the security*

intended to be given to Seller under and by virtue of this Contract . . .[.]" *Slip* op. at 3 (emphasis supplied). The Williamses would have us interpret the foregoing language as placing only desertion and abandonment of the property into the category of breaches that justify forfeiture under the contract. Such ignores the phrase, "or commits any other willful breach . . . which materially diminishes the security intended to be given to Seller …." Surely, defaulting on the payment terms fits within that category as well. The Majority does not hold otherwise. Rather, my colleagues conclude that default judgment should be set aside under T.R. 60(B)'s catchall provision, i.e., subsection (8).

A motion for relief under T.R. 60(B)(8) is addressed to the equitable discretion of this court. *Weppler v. Stansbury*, 694 N.E.2d 1173 (Ind. Ct. App. 1998). We review for abuse of discretion, which occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id*. Notably, relief is available under this subsection only were extraordinary circumstances are demonstrated. *Id*. What are the "extraordinary" circumstances justifying relief in this case? My interpretation of the Majority's holding is that the "extraordinary circumstance" here can only be that the trial court's judgment effects a forfeiture and the law abhors a forfeiture in this context. In reaching this conclusion, the Majority relies primarily on *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974). That case reflected the Supreme Court's disfavor of the remedy of forfeiture in a land sales contract. According to the Majority's interpretation of *Skendzel*, forfeiture in this context is available only where (1) the buyer abandoned the property, or (2) the buyer has paid a minimal amount and the vendor's security interest in the property

has been jeopardized by the acts or omissions of the buyer. Noting that Hilycord's complaint does not specifically allege either (1) or (2) above, the Majority reasons that forfeiture therefore is not a legally permissible option here.

As another panel of this court recently observed, "the determination as to whether payments made toward a contract are minimal enough to allow forfeiture does not depend on a mere statistical formula, and the totality of the circumstances must be examined." *Huber v. Sering*, 867 N.E.2d 698, 708 (Ind. Ct. App. 2007), *trans. denied*. In other words, there is no benchmark with respect to the percentage of payments made toward the contractual purchase price, above which forfeiture is not permitted. The percentage of the total price paid before default is merely one factor to consider in analyzing the equities. The Williamses paid 28.5% of the contract price. I do not believe that percentage forbids forfeiture. We must therefore look further.

It is significant to me that the Williamses drafted the contract provision that Hilycord seeks to enforce here. There is nothing in the record to suggest that this contract and this provision were anything other than the freely bargained agreement of the parties. Thus, it represents the negotiated wishes of *both* parties, including the Williamses. I would not exercise our equitable powers to permit the Williamses to escape the consequences of a provision that they not only bargained for, but also drafted.

This brings me to a larger issue, i.e., the freedom to contract. Recently, our Supreme Court indicated unequivocally that it regards that freedom as significant and worthy of protection by our courts. Specifically citing *Skendzel*, among other cases, the Supreme Court observed,

> Despite the longstanding principles represented by these cases of ours and the Court of Appeals, we are left with some unease over any decision where what appears to be the freely bargained agreements of the parties are set aside. Fixing the respective rights and expectations of the parties as to damages makes economic and commercial sense. Enforcing such provisions would seem to conform to this Court's longstanding recognition of the freedom of parties to enter

> into contracts and our presumption that contracts represent the freely bargained agreement of the parties.

Time Warner Entertainment Co., L.P. v. Whiteman, 802 N.E.2d 886, 894-95 (Ind. 2004).

Finally, I return to the fact that this case comes before us upon the denial of a T.R. 60(B)(8) motion for relief from judgment. The subsection upon which the Majority's decision is based requires extraordinary circumstances as a prerequisite for granting relief. In this case, putting aside for the moment the forfeiture/foreclosure question, the Williamses neglected to answer Hilycord's complaint in a timely fashion. As is the case with defaulting on their underlying contractual payment obligations, I discern no extraordinary circumstances concerning their failure to timely respond to the complaint.

In the end, we must remember the maxim, "he who seeks equity must do equity." *Huber v. Sering*, 867 N.E.2d at 708 (quoting *Willig v. Dowell*, 625 N.E.2d 476, 484 (Ind. Ct. App. 1993), *vacated in part on other grounds on reh'g*, 627 N.E.2d 1365 (1994)). The Williamses reached an agreement to purchase land from Hilycord, drafted and signed the contract therefor, breached the contract by failing to make payments, failed to respond to his lawsuit for breach of contract, and thus had default judgment entered against them. They now seek to set aside that judgment and thereby escape the rigors of the contract they freely bargained for and drafted. I would not permit them to do so.